



**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

---

Judgment No. 2023-UNAT-1362

**Richard Loto  
(Appellant)**

**v.**

**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**

---

Before:	Judge Graeme Colgan, Presiding Judge Sabine Knierim Judge Gao Xiaoli
Case Nos:	2022-1713 & 2022-1751
Date of Decision:	30 June 2023
Date of Publication:	26 July 2023
Registrar:	Juliet Johnson

---

Counsel for Appellant:	Sètonджи Roland Adjovi
Counsel for Respondent:	Angélique Trouche

**JUDGE GRAEME COLGAN, PRESIDING.**

1. Richard Loto (Appellant), a former staff member with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), appeals the dismissal of his application before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Judgment No. UNDT/2022/081 (impugned Judgment).<sup>1</sup>
2. The UNDT dismissed Mr. Loto's challenge to the decision by the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/MSPC) to terminate his employment with the Organization as a disciplinary measure (contested Decision).
3. Before delivering the impugned Judgment, the UNDT also issued Order No. 081 (NBI/2022),<sup>2</sup> in which it denied Mr. Loto's motion to exclude from evidence an audio-recording and to strike out certain portions of the Secretary-General's reply to his application (impugned Order). Mr. Loto lodged an interlocutory appeal of the impugned Order with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal). This Judgment also decides that appeal, the cases having been consolidated.
4. We have considered the foregoing appeals in this Judgment, and for the reasons set forth below, dismiss Mr. Loto's appeals and affirm the impugned Judgment.

**Facts and Procedure**

5. Mr. Loto joined the Organization as a Mail Assistant in New York in 1989. At times relevant to these appeals he was serving with MONUSCO in Goma, Democratic Republic of the Congo.
6. Mr. Loto was friendly with a female employee (VO1) of a service vendor of MONUSCO. She looked up to him and was to an extent dependent on him. For example, she referred to him as "Papa Richard". On 28 June 2019, Mr. Loto invited VO1 to a happy hour that evening, a work-associated social occasion. At the happy hour, VO1 met J.M., a United Nations Volunteer (UNV) known to Mr. Loto. At about 10:00 pm, Mr. Loto invited VO1, Mr. J.M., and two others to come to his house to continue socializing, which they did. VO1 later said she would like to leave, and Mr. J.M. offered to drive her.

---

<sup>1</sup> *Loto v. Secretary-General of the United Nations*, Judgment No. UNDT/2022/081 (20 September 2022).

<sup>2</sup> *Loto v. Secretary-General of the United Nations*, Order No. 081 (NBI/2022).

7. On 8 July 2019, VO1 sent Mr. Loto a WhatsApp message that she had been sexually abused by Mr. J.M. on that night of 28-29 June 2019.
8. On 10 July 2019, VO1 met with Mr. Loto, at his invitation, to discuss this. She told him that she had been raped by Mr. J.M.<sup>3</sup> She subsequently said Mr. Loto told her that he would arrange a meeting between VO1 and Mr. J.M. to resolve the matter amicably.
9. It is undisputed that Mr. Loto failed to report VO1's allegation, either to the MONUSCO Conduct and Discipline Team (CDT), to the Office of Internal Oversight Services (OIOS), or to anyone else officially.
10. On 20 November 2019, VO1 made a complaint of rape against Mr. J.M. with the CDT. In her report, she stated that she had previously told Mr. Loto about this incident and that Mr. Loto knew the perpetrator.
11. On 21 November 2019, the Officer-in-Charge (OIC) of the CDT, Mr. A.A., called Mr. Loto to his office and told him that the CDT had received a complaint of sexual exploitation and abuse (SEA) from a female (VO1). Mr. A.A. asked about the identity of the perpetrator.
12. On 22 November 2019, the CDT referred the matter to OIOS for initial investigation.
13. On 23 November 2019, Mr. Loto approached Mr. J.O., Chief Resident Auditor, OIOS, MONUSCO, requesting a meeting.
14. On 25 November 2019, Mr. Loto met with Mr. J.O. and explained that VO1 had made an allegation of rape to him, that he had not reported it, that VO1 had since reported it to the CDT, and that the CDT had contacted him about this matter. Mr. Loto sought Mr. J.O.'s guidance because Mr. J.O. was a staff member of OIOS. However, Mr. J.O. explained that he was in a different section of OIOS, and further told Mr. Loto that he should have reported the SEA complaint as soon as he learned of it.<sup>4</sup> Mr. J.O. and Mr. Loto agreed to meet later in the day with VO1 and Mr. J.M.
15. Mr. Loto collected VO1 from her workplace and drove her to Mr. J.O.'s office, where they met with Mr. J.M. and another person, Mr. B.K.

---

<sup>3</sup> Respondent's Answer, Annex 3 (Allegations Memorandum, paras. 4-14).

<sup>4</sup> *Ibid.*, para. 22.

16. V01 told the UNDT that the objective of the meeting was to get her to withdraw her complaint to the CDT in exchange for taking her to the United States, and that she was also offered the sum of USD 2,000.

17. Without Mr. Loto's knowledge or agreement, V01 recorded the meeting on her phone. The transcript of the audio-recording contains the following excerpts:<sup>5</sup>

Mr. J.O.            Okay, we are here because the case has already started, because you have  
Mr. R.L.<sup>6</sup>:        Filed a complaint  
Mr. J.O.:            Filed a complaint  
V01:                Yes  
...  
Mr. J.O.:            (...) Papa Richard [] is also in this case because he has, he has ["arranged"]  
the opportunity; he has paid money for all of you to drink alcohol and  
things; and he has heard that there was [incomprehensible word] and that  
V01:                Yes  
Mr. J.O.            But he did not report it, okay. So he has this case, he has this case  
V01:                Yes  
Mr. J.O.            Okay, I don't know if you know that in the process of the things...  
V01                 Hmmm  
Mr. J.O.            When we start to do the investigation, the two persons are going  
Mr. R.L.            Suspended  
Mr. J.O.            Going home  
V01                 Hmmm  
...  
Mr. R.L.            No, I have six children. I have six children, two is in college, if they fire me  
now, I'm dead [incomprehensible] suicide  
...  
V01                 What can I do to make Papa Richard apart from this problem?

---

<sup>5</sup> Respondent's Answer, Annex No. 5 (Transcript of Audio Recording).

<sup>6</sup> Mr. R.L. is the Appellant, Mr. Loto.

Mr. J.O. It is you to, you see, the best you can do if you can go back where you put the case and say it was a misunderstanding; I don't want that case, please stop that case

Vo1 Hmmm

...

Mr. R.L. And then when you go there, they are going to say to you "did he influence you? Did they intimidate you? Or did we call you to intimidate you? No, it was your h[e]art. If you love me, withdraw the case, you will always be my daughter for life, you don't have any idea what service you will give me and my whole family and all my generation and all of your brothers, you don't have an idea of the gift I can give you?

...

Mr. R.L. I can even bring her to my place in New York one day for that gesture she will going to do

Vo1 Okay Papa Richard, I already understood it, I want this man to accept what, first he did for me because he told Papa Richard he didn't do nothing, yes, I want him to accept and apologize first

...

Mr. J.M. I'm sorry for all what happened.

Vo1 Hmmm

Mr. J.M. You accept my apology?

Vo1 I accept.

...

Vo1 (...) What I can say, I want him to compensate me, this man here and then, tomorrow morning or even now I can go to CDU to withdraw.

...

Mr. J.O. You will go there and it is not say that people have

Mr. R.L. Influenced you

Vo1 no no no, I understand

Mr. J.O. Or threatened, no it was your own will

Vo1 Yes

...

Vo1 I want him to compensate me, first he has been too stubborn, him there, he was too stubborn, you understand the word "stubborn?" He was

stubborn towards me and if I do this, it is not for him but for Papa Richard, okay? And for that, for this case, I will want him to pay me money for what happened, \$2,000 dollars

Mr. R.L. [Vo1], that is a lot

...

Vo1 You don't have to stand up for him Papa Richard, if I withdraw the case from CDT it is for you and not for him; 2,000 dollars, I know, I do not want to discuss that further...

... [extended discussion of payment options]

Mr. R.L. 250 dollars every end of the month, 250 dollars every end of the month

Vo1 Okay

...

Mr. J.O. Okay. So, something which is urgent now is to go there

Vo1 Yes, I will go.

18. After the meeting ended, Vo1 went to the CDT and asked to withdraw her complaint. Mr. Loto followed her there. When Mr. A.A. met her, he advised her not to “sell her dignity.” Vo1 then decided not to withdraw her complaint.<sup>7</sup>

19. On 10 December 2019, OIOS sent individual e-mails to Mr. Loto, Mr. J.M. and Mr. J.O. inviting them for interviews about these matters. Mr. Loto’s interview was scheduled for 13 December 2019.

20. On 11 December 2019, Mr. Loto called Mr. J.O. and Mr. J.M. and they arranged to meet. Mr. Loto admits that at their meeting he sought advice from Mr. J.O. about what he should say to the OIOS investigators. Mr. Loto stated that Mr. J.O. advised him not to discuss the arrangement to pay Vo1 USD 2,000, but instead to say that the dispute was a misunderstanding about money between Vo1 and Mr. J.M.<sup>8</sup>

21. Mr. Loto was interviewed by OIOS on 13 and 16 December 2019.

---

<sup>7</sup> Impugned Judgment, para. 20.

<sup>8</sup> *Ibid.*, para. 24.

22. On 13 January 2020, Mr. Loto was placed on administrative leave without pay (ALWOP) for three months or until completion of the OIOS investigation.<sup>9</sup>

23. On 28 January 2021, the Director, Administrative Law Division, Office of Human Resources sent Mr. Loto a memorandum setting out three formal allegations of misconduct (Allegations Memorandum):<sup>10</sup>

- a. In July 2019, VO1 informed you that she had been raped by Mr. [J.M.], a UN Volunteer on the night of 28-29 June 2019. You failed to report the allegation to the Organization, for instance, to the MONUSCO CDT or to OIOS.
- b. On 25 November 2019, after VO1 made a complaint to the CDT alleging that Mr. [J.M.] had raped her, you facilitated a mediation between VO1 and Mr. [J.M.]. You arranged a meeting between yourself, VO1, Mr. [J.M.], Mr. [J.O.] and Mr. [B.K.] to discuss VO1's complaint. During that meeting, you, repeatedly urged VO1 to withdraw her complaint from the CDT, told her to say that she was withdrawing the complaint of her own volition, and facilitated an agreement pursuant to which Mr. [J.M.] would pay VO1 USD \$2,000, with your financial assistance if required, in return for the withdrawal of her complaint and/or in connection with her complaint of rape.
- c. On 11 December 2019, after having received notice from OIOS investigators of the investigation into your conduct and of your upcoming interview, you arranged a meeting with Mr. [J.O.] and Mr. [J.M.]. During that meeting, you discussed the OIOS investigation and sought advice from Mr. [J.O.] regarding what you should say during your interview.

24. Mr. Loto was provided with a copy of the OIOS investigation report and an opportunity to submit any explanation. He requested and was granted an extension of time to do so. On 16 April 2021, he submitted his comments.

25. On 4 October 2021, the USG/MSPC issued the sanction letter conveying the contested Decision. The sanction letter stated that:<sup>11</sup>

Mr. Loto's actions amounted to serious misconduct under Chapter X of the Staff Rules. Not only did Mr. Loto fail to report an allegation of SEA, SEA being itself serious misconduct,

---

<sup>9</sup> This administrative decision became the subject of a separate application to the UNDT by Mr. Loto, and ultimately, the subject of the appeal underlying *Richard Loto v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1292 (*Loto I*).

<sup>10</sup> Impugned Judgment, para. 4, and Respondent's Answer, Annex 2 (28 January 2021 Interoffice Memorandum to Mr. Loto from Director, ALD, OHR).

<sup>11</sup> Respondent's Answer, Annex 3 (4 October 2021 Letter to Mr. Loto from the Assistant Secretary-General for Human Resources on behalf of USG/MSPC).

but he additionally took active steps to conceal the allegation from the Organization and to interfere with its ordinary investigative processes into such matters.

26. Addressing the sanction it was to impose, the USG/MSPC noted that the “Organization undertakes great effort to ensure that all of its personnel comply with the absolute prohibition on SEA” and that “[s]uccess depends to a large extent on each staff member reporting any allegation, information, suspicion, or concern of such possible misconduct to the appropriate officials. It therefore follows that any deliberate attempt to conceal an allegation of SEA (...) should also be taken extremely seriously”.<sup>12</sup>

27. The Administration determined that the disciplinary measure of dismissal in accordance with Staff Rule 10.2(a)(ix)<sup>13</sup> was appropriate and proportionate.

*Dispute Tribunal proceedings*

28. On 2 January 2022 Mr. Loto filed an application with the UNDT to challenge the contested Decision. On 2 February 2022, the Secretary-General filed his reply, and included as annex 7, the brief of the Office of Legal Affairs (OLA) in the Administration’s appeal of the Judgment No. UNDT/2021/133, wherein the Dispute Tribunal found Mr. Loto’s placement on ALWOP to be unlawful.<sup>14</sup>

29. On 8 July 2022, a Case Management Discussion (CMD) was held. Counsel for Mr. Loto raised arguments regarding the admissibility of the audio-recording made by VO1 and also objected to the inclusion in the Secretary-General’s reply of the OLA brief in Mr. Loto’s pending appeal before the UNAT. Following the CMD, Mr. Loto filed a motion to exclude from evidence the “secret” recording and transcription, and to strike out paragraph 26 of the Secretary-General’s reply to the application and annex 7.

30. On 15 July 2022, the UNDT issued the impugned Order rejecting Mr. Loto’s motion. The UNDT held that the Secretary-General’s reply and annexes were submissions, and “mere disagreements with the opposite party’s submissions (...) do not constitute a ground for a motion to strike”.<sup>15</sup>

---

<sup>12</sup> *Ibid.*

<sup>13</sup> Secretary-General’s Bulletin ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations).

<sup>14</sup> This UNDT judgment was the subject of *Loto I*.

<sup>15</sup> Impugned Order, para. 4.



31. The UNDT further held that it was “premature” to object to the audio-recording, and that this “would be best raised during the main hearing and in closing submissions and addressed by the Tribunal as part of the final judgment”.<sup>16</sup> The Dispute Tribunal reasoned that having “a hearing to determine the admissibility of specified pieces of evidence if granted would lead to an unhealthy situation where the Tribunal would conduct mini hearings and draft a multiplicity of micro judgments before the main hearing and final judgment (...) would be detrimental to judicial economy”.<sup>17</sup>

32. On 24 July 2022, Mr. Loto filed an interlocutory appeal of the impugned Order with the Appeals Tribunal. The Secretary-General responded, arguing that the interlocutory appeal was not receivable; and in any event, the UNDT was correct on the merits. This is UNAT Case No. 2022-1713.

33. A UNDT hearing on the merits of Mr. Loto’s claims was held on 4, 5, and 8 August 2022, and the UNDT heard evidence from Mr. Loto, Mr. J.O., Mr. A.A., and VO1.

34. On 22 September 2022, the UNDT issued the impugned Judgment. The UNDT found that Mr. Loto’s failure to report the SEA complaint, his pressuring VO1 to withdraw her complaint, negotiation of the payment agreement, and interference with the OIOS investigation, were all established by clear and convincing evidence, including by his own admissions.<sup>18</sup>

35. The UNDT noted that Mr. Loto did not contest that the established facts amounted to misconduct, in that he violated Staff Regulation 1.2(b), Staff Rules 1.2(c), 1.2(e),<sup>19</sup> as well as Sections 3.2(e) and 3.2(f) of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse).<sup>20</sup>

36. The UNDT held that Mr. Loto’s due process rights had been respected. It rejected as without merit Mr. Loto’s submission that the title of the OIOS report indicated that he was not afforded a presumption of innocence, and that the Allegations Memorandum was signed by an official without authority to do so.<sup>21</sup>

---

<sup>16</sup> *Ibid.*, para. 6.

<sup>17</sup> *Ibid.*, para. 7.

<sup>18</sup> Impugned Judgment, paras. 16 and 23-24.

<sup>19</sup> ST/SGB/2018/1.

<sup>20</sup> Impugned Judgment, para. 26.

<sup>21</sup> *Ibid.*, paras. 32 and 45.

37. The UNDT considered unproven Mr. Loto's claim that Mr. A.A. violated his rights by threatening him that he would be investigated, sent home without a salary, and that he would "have a bad Christmas".<sup>22</sup>

38. Turning to Mr. Loto's objections to the impugned audio-recording, the UNDT relied on the Appeals Tribunal's jurisprudence in *Ashgar*,<sup>23</sup> in which the UNAT held that even "[w]here evidence has been obtained in an improper or unfair manner it may still be admitted if its admission is in the interests of the proper administration of justice".<sup>24</sup>

39. The UNDT held that Mr. Loto's actions of trying to secure a withdrawal of VO1's complaint to the CDT could only be executed with very high levels of secrecy, and thus the audio-recording was the "only reasonable way" of obtaining credible evidence of his misconduct.<sup>25</sup> The UNDT also considered that VO1 had reasonable concerns about the subject matter of the meeting to justify making a recording as a precaution when meeting her alleged rapist at the meeting organized by Mr. Loto.<sup>26</sup> The UNDT found that the audio-recording, which documented Mr. Loto's participation in the negotiations was not prejudicial to him since he admitted the particulars of its contents. Thus, the UNDT concluded that the admission in evidence of the audio-recording was in the interests of the proper administration of justice.<sup>27</sup>

40. With regard to the sanction imposed on Mr. Loto, the UNDT noted that he did not directly address the proportionality of the sanction, but instead claimed that the established facts did not support the charges. The Dispute Tribunal "fully agree[d] with the Respondent that [Mr. Loto] engaged in serious misconduct under Chapter X of the Staff Rules" and that the "sanction imposed on him accords with the practice of the Secretary-General in similar cases and accords with the policies of the Organization".<sup>28</sup> Accordingly, Mr. Loto's application was dismissed for lack of merit.

41. On 20 November 2002, Mr. Loto filed an appeal of the impugned Judgment with the Appeals Tribunal, which is UNAT Case No. 2022-1751.

---

<sup>22</sup> *Ibid.*, para. 36.

<sup>23</sup> *Ashgar v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-982, para. 43.

<sup>24</sup> Impugned Judgment, para. 40.

<sup>25</sup> *Ibid.*, para. 41.

<sup>26</sup> *Ibid.*, para. 42.

<sup>27</sup> *Ibid.*, para. 43.

<sup>28</sup> *Ibid.*, paras. 50 and 53.

42. On 16 December 2022, the Appeals Tribunal issued *Loto I*, whereby it granted the Secretary-General's appeal and decided that the UNDT erred in concluding that Mr. Loto's placement on ALWOP pending the investigation was unlawful.

43. By Order No. 517 (2023),<sup>29</sup> Case Nos. 2022-1713 and 2022-1751 were consolidated for hearing and decision.

### **Submissions**

#### **Case No. 2022-1713**

##### **Mr. Loto's Interlocutory Appeal**

44. Mr. Loto submits that the UNDT erred in denying his motion to exclude the audio-recording made by VO1 without his knowledge. Mr. Loto argues that the audio-recording and transcript is the foundation of the Secretary-General's case, and the composition of the witness list and the questions to be asked of the witnesses, were completely determined based on the secret recording.

45. Mr. Loto argues that contrary to the UNDT's reasoning, it would be in the interests of judicial economy to strike the audio-recording, because if it is not admissible, then numerous witnesses would not need to be heard and large amounts of questions would not need to be asked. Mr. Loto submits that the UNDT should have proceeded as it did in *Chhikara*,<sup>30</sup> wherein the Dispute Tribunal ruled on the admissibility of a recording prior to proceeding to judgment on the merits, because the recording had significant probative value and the likelihood to impact the direction of the proceedings.

46. Mr. Loto submits that the UNDT erred in failing to strike out paragraph 26 of Respondent's reply and annex 7, which was the OLA brief in appealing Judgment No. UNDT/2021/133, then pending as UNAT Case No. 2022-1651.

47. Mr. Loto argues that the OLA brief was "manifestly inadmissible" and objects to the Respondent's characterisation of the latter UNDT judgment being "erroneous". Mr. Loto says that

---

<sup>29</sup> *Richard Loto v. Secretary-General of the United Nations*, Order No. 517 (2023).

<sup>30</sup> *Chhikara v. Secretary-General of the United Nations*, Order No. 172 (NBI/2016).

it is a further “travesty” that Respondent did not include Mr. Loto’s reply brief in UNAT Case No. 2022-1651. He contends that the Respondent is “attempting to improperly backdoor evidence and influence the Judge” and this should not be tolerated. By failing to strike paragraph 26 of Respondent’s reply and the offending annex 7, Mr. Loto submits that the UNDT erred in fact and committed errors in procedure.

48. Mr. Loto requests that the UNAT find the interlocutory appeal receivable, vacate Order No. 081, grant his motion to strike out, and assign his case to a different UNDT judge.

### **The Secretary-General’s Answer on the Interlocutory Appeal**

49. The Secretary-General submits that the interlocutory appeal is not receivable because it is clearly not an appeal of a final judgment, and there is no basis to contend that the UNDT exceeded its jurisdiction in making the impugned Order.

50. The Secretary-General points out that the interlocutory appeal is challenging a case management decision, and the UNAT has held that appeals of interlocutory decisions on matters of evidence, procedure, and trial conduct are not receivable. Indeed, in *Atogo*,<sup>31</sup> the UNAT dismissed as non-receivable an appeal against an order rejecting a motion to strike out evidence.

51. On the merits, the Secretary-General submits that as the contested Decision was based, among other things, on the audio-recording and transcripts thereof, these materials must be available to the UNDT for it to decide the lawfulness of the Administration’s actions.

52. The Secretary-General argues that judicial economy does not support having a separate hearing only on the admissibility of the audio-recording, and that Mr. Loto can make his arguments in his closing submissions.

53. The Secretary-General submits that there is no legal basis to strike out paragraph 26 of his reply, or annex 7, as these were in support of the Secretary-General’s answer to Mr. Loto’s arguments in his application. The Secretary-General points to *Bezziccheri*,<sup>32</sup> in which the UNAT stated that “it is indeed not up to a party to request that the Appeals Tribunal strike out

---

<sup>31</sup> *Atogo v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-054, para. 9.

<sup>32</sup> *Bezziccheri v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-948/Corr. 1, para. 34.

each and every argument she or he does not agree with, since it is natural that the parties may dispute certain issues or matters at stake”.

54. The Secretary-General requests that the UNAT dismiss the interlocutory appeal.

***Case No. 2022-1751***

**Mr. Loto’s Appeal**

55. Mr. Loto submits that the UNDT committed an error of procedure because it did not consider his arguments on due process “seriously”. Mr. Loto states that the way OIOS conducted its investigation shows bias against him.

56. Mr. Loto appears to argue that the Dispute Tribunal should have dismissed the allegations of misconduct against him due to the “illegality of the recording that was at the heart of the accusation”.

57. Mr. Loto refers simply and without explanation to paragraphs in his application and closing submissions before the UNDT to support his arguments.<sup>33</sup> In the referenced paragraphs of his application, Mr. Loto argued to the UNDT that there is a “blatant double standard” and that the Secretary-General objects to clandestine recordings when it does not suit his case but urges admissibility of such recordings when they help his case.

58. In the referenced submissions to the UNDT, Mr. Loto called “for a clear pronouncement to put a stop to this practice by ruling this unlawful recording inadmissible”. Mr. Loto also argued that anything subsequently stated in interviews of the participants in the 25 November 2020 meeting that was secretly recorded should be disregarded under the “fruit of the poisonous tree” doctrine.

59. Mr. Loto submits that the UNDT made numerous mistakes of fact that led to a manifestly unreasonable decision. He argues that he cannot be sanctioned for not reporting sexual misconduct when that sexual misconduct has not been established. He asserts that the core allegation is that Mr. J.M. raped VO1, but the UNDT only heard evidence from VO1 and

---

<sup>33</sup> We consider that this is an unsatisfactory short-cutting procedure. Counsel should explain in the appeal brief what the argument is, rather than just reference paragraphs and five annexes from his UNDT submissions without more. We have, nevertheless, attempted to understand as well as we can the gravamen of the arguments.

did not hear from Mr. J.M. Mr. Loto notes that the Respondent did not even try to establish that the core allegation occurred and argues that “it is logically impossible to find that a failure to report something that did not happen constitutes a misconduct”.

60. Mr. Loto argues that the UNDT should not have relied on the WhatsApp exchange between VO1 and himself after the night in question. This exchange cannot support the conclusion that he was genuinely informed of sexual abuse, or alternatively, whether he was witness to an extortion scheme.

61. Mr. Loto submits that the UNDT made a clear factual error in stating that VO1 “was also offered \$2,000” when the audio-recording “clearly proves” that VO1 demanded the \$2,000 (“I will want him to pay me money for what happened. \$2,000.”). Mr. Loto argues this demonstrates that VO1 committed attempted extortion, a criminal act for which she has not been charged.

62. Mr. Loto submits that the UNDT failed to consider suggestive messages that VO1 sent to Mr. J.M. after the night of the alleged abuse, and that she was caught in a lie about whom she went to a swimming pool with.

63. Mr. Loto contends that there is no evidence in the secret audio-recording to show that any pressure was placed on VO1.

64. Mr. Loto submits that the UNDT failed to explain how it found him credible when Mr. Loto testified against Mr. J.O. in a companion case, but then unreliable about other matters in his own case.

65. Mr. Loto requests rescission of the contested Decision and reappointment to a suitable position, and compensation for harm to his career and self-respect. If the UNAT still considers the sanction of separation was appropriate, Mr. Loto requests that the sanction is modified to include a termination indemnity.

### **The Secretary-General’s Answer**

66. The Secretary-General submits that the UNDT was correct to find that the disciplinary sanction was within the Administration’s discretion and was lawful. The Respondent supports the UNDT’s finding that there was ample evidence that Mr. Loto failed to report an SEA

complaint, and that this was misconduct. The Secretary-General further relies on the UNAT's finding in its prior judgment that Mr. Loto was duty-bound to report the complaint.<sup>34</sup>

67. The Secretary-General submits that the UNDT was likewise correct to find, after reviewing the evidence, that Mr. Loto pressured VO1 to withdraw her complaint, and that by his own admission, he participated in interfering with the OIOS investigation. The Respondent submits that the UNDT correctly found that the established facts amounted to misconduct pursuant to Staff Regulation 1.2(b), and Staff Rules 1.2(c), 1.2(e) and 1.2(g)<sup>35</sup> as well as Sections 3.2(e) and 3.2(f) of ST/SGB/2003/13.

68. The Secretary-General submits that Mr. Loto's vague contentions that the UNDT "did not consider his arguments on due process seriously" are baseless. The Secretary-General argues that the Appellant is merely rearguing his case presented to the UNDT because he disagrees with the outcome, which is not permitted by UNAT jurisprudence.

69. The Secretary-General submits that the UNDT correctly rejected Mr. Loto's arguments that his due process rights were not respected because the OIOS investigation report was titled "investigation report on prohibited conduct" instead of "allegations of prohibited conduct".

70. The Secretary-General submits that the UNDT rightly found that there was no evidence that Mr. A.A. harassed Mr. Loto, or that there was a breach of his rights when Mr. A.A. provided Mr. Loto confidential information that VO1 had made an SEA complaint.

71. The Secretary-General contends that the UNDT properly rejected Mr. Loto's complaints about the admissibility of the audio-recording, on the grounds that its significant evidentiary value was to show the Appellant's misconduct, that the Appellant could have no expectation that the meeting would stay secret, and that the Appellant admitted material elements of the audio-recording's content. Moreover, VO1 also testified to what occurred during the recorded meeting.

72. The Secretary-General submits that the UNDT correctly rejected Mr. Loto's claim that the Allegations Memorandum was signed by an official without proper authority.

---

<sup>34</sup> *Loto I*, para. 82.

<sup>35</sup> ST/SGB/2018/1.

73. The Secretary-General submits that the UNDT was right to find that the investigation and disciplinary process had followed the relevant legal framework.

74. The Secretary-General argues that the UNDT did not err in finding that the sanction of dismissal was proportionate to the established misconduct.

75. The Secretary-General submits that Mr. Loto's contention that "he cannot be sanctioned for not reporting a sexual misconduct that has not been established" is erroneous. The Secretary-General points out that the UNAT has already held in Mr. Loto's earlier case that Mr. Loto's duty to report arose at the time he had sufficient details that objectively raised concerns and suspicions that sexual abuse had occurred.<sup>36</sup> The Secretary-General reiterates that "it is irrelevant and not of the Appellant's concern whether VO1's allegations are eventually established".

76. The Secretary-General submits that Mr. Loto's claim that the UNDT found he failed to report the SEA complaint by "rel[ying] on a single text message taken out of context", is a misrepresentation. The UNDT referred to the WhatsApp exchange, Mr. Loto's own evidence, as well as the accounts of VO1 and Mr. A.A. The UNDT properly concluded that evidence of Mr. Loto's awareness of the alleged rape of VO1 by Mr. J.M. was "undisputed".

77. The Secretary-General submits that the UNDT did not commit a manifest error of fact in finding that Mr. Loto and his colleagues, including a senior staff member of OIOS, pressured VO1 and repeatedly urged her to withdraw her SEA complaint. The finding was consistent with VO1's testimony and the audio-recording.

78. The Secretary-General rejects the Appellant's arguments that VO1 attempted an extortion scheme, pointing out that Mr. Loto organised the meeting with VO1 for the purpose of pressuring her to withdraw the complaint and that Mr. Loto first proposed bringing her to New York in return for its withdrawal. Moreover, the Secretary-General notes that Mr. Loto and the other participants encouraged her request for compensation and helped organise a payment by instalments.

79. The Secretary-General says that the Appellant's complaint that the UNDT found his evidence reliable only in respect of his meeting with Mr. J.O. on 11 December 2019, does not

---

<sup>36</sup> *Loto I*, para. 82.



refer to a finding in the impugned Judgment, but rather to Judgment No. UNDT/2022/082 concerning Mr. J.O., and thus this claim should be disregarded.

80. The Secretary-General requests that the UNAT uphold the impugned Judgment and dismiss the appeal.

### Considerations

81. We deal first with the appeal against the UNDT's interlocutory decision refusing Mr. Loto's motion and the jurisdictional counter to this by the Secretary-General. Under Article 2(1) of the Statute of the United Nations Appeals Tribunal, to be appealable a UNDT decision must be a "judgment" of the Dispute Tribunal. The Statute is silent as to whether this is to be a final judgment, or whether it may include an interlocutory order or a preliminary judgment.

82. The cases decided by the UNAT on this question indicate that while some significant interlocutory decisions will be appealable, most, including issues of admissibility of evidence, hearing procedure and the like must await an appeal against the UNDT's substantive or final judgment before they can be aired.<sup>37</sup> Exceptions to this practice may include where the UNDT has manifestly exceeded its jurisdiction or powers in determining an interlocutory issue. A useful test to determine whether any particular interlocutory order is amenable to immediate and discrete appeal is to ask whether the rights or obligations of either party are affected irrevocably by the interlocutory order or its implementation, or, on the other hand, whether if the UNDT has erred, the decision and its effects can be justly remedied as part of a later substantive appeal.

83. This case falls into the latter category, that is Mr. Loto's complaints about what the UNDT decided it would admit in evidence and what submissions it would consider in deciding his substantive case, were and are now remediable if they were wrongly decided. There is no question that the UNDT acted within its jurisdiction in considering and deciding these questions. We will accordingly determine them as aspects of Mr. Loto's second appeal.

84. The appeal against the impugned Order must be and is accordingly dismissed for want of jurisdiction.

---

<sup>37</sup> See, e.g., *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, paras. 20-21; *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005, para. 8.

85. We move now to Mr. Loto's substantive appeal against the UNDT's final judgment. This turns substantially, although not completely, on the effect of the admission in evidence of the allegedly inculpatory and covertly-recorded conversation at the crucial 25 November 2019 meeting and the transcript of that event. Mr. Loto has reiterated the argument that he sought to raise in his first appeal against the impugned Order which we have just rejected for want of jurisdiction. Therefore, the issue of the admissibility in evidence of the covert recording must and will be considered by us on its merits.

86. Mr. Loto was not entrapped, or tricked, into participating in this meeting where the recording was made surreptitiously by VO1. Indeed, the meeting was arranged by him and VO1 had no part in arranging it or in its subject matter. It was a meeting in which she felt obliged to participate but, unlike the other participants, she had no support, and it followed many months of inactivity by Mr. Loto, despite his assurance to her when she first disclosed to him the SEA she had experienced, that he would assist her to address it.

87. Next, Mr. Loto seeks to rely on the recording of the meeting to assert that it was VO1 who sought to persuade Mr. J.M. to pay her money to compensate her for having been raped and not that this payment would be a part of the plan to persuade her to withdraw her complaint. While the recording of this conversation would not have precluded any participant at the meeting from giving his or her oral account of it from memory, without recourse to the recording, it would be difficult to confirm what had been said by whom, how, and in what sequence. The recording and related transcript assisted in determining any potential evidential conflict about what was said and by whom.

88. As this case has played out, Mr. Loto's "judicial economy" argument for excluding the recording and its transcript is not an issue, or at least one that he can advance successfully on appeal. If "judicial economy" means that the UNDT ought to have held a separate and preliminary hearing into the admissibility of the recording evidence, then the answer is that the UNDT did as Mr. Loto submits it should have done. As it transpired, the UNDT effectively adopted this "economical" approach in the sense of providing him a "hearing" of his views, but nonetheless concluded that the evidence was admissible. Further, however, even if the UNDT had ruled the audio-recording inadmissible, the Dispute Tribunal may still have faced contested oral evidence from the participants about what had been said and by whom at the hearing on the merits. The preliminary consideration of the recording's admissibility and its admission was an exercise in judicial economy and one which allowed the UNDT to decide

more surely what had occurred at the 25 November 2019 meeting that was recorded by VO1. Even if there had been any merit to Mr. Loto's submission, this was a matter of the Dispute Tribunal's procedure on which the UNDT has broad, but not unlimited, autonomy, with which we would not have interfered and indeed we are satisfied that the UNDT correctly admitted this evidence.

89. We decide likewise in relation to Mr. Loto's argument that the UNDT erred in refusing to strike out parts of the Secretary-General's submissions in reply and the OLA brief that was annexed to them, which related to another appeal of Mr. Loto that was then before the UNAT. The Dispute Tribunal was well-placed to discern any irrelevancies or other inadmissibilities, especially after Mr. Loto had drawn these to its attention by his motion.<sup>38</sup> There is nothing in the impugned Judgment to suggest that the UNDT was influenced, either properly or improperly, by these materials submitted by the Secretary-General, and Mr. Loto has not identified any specific prejudice that he may have suffered by their inclusion in the materials considered by the Dispute Tribunal.

90. While the latter ground of appeal has not availed Mr. Loto in this case, we would recommend to parties to not include arguably extraneous material in their submissions to the UNDT or to the UNAT. Doing so just invites a response, as Mr. Loto has done here, creating a further distraction with this extraneous material.

91. We consider next Mr. Loto's argument that the UNDT did not address his due process arguments "seriously" and in particular did not address his contention that the OIOS investigation was biased against him. This is based on the erroneous proposition that the covert recording of the 25 November 2019 meeting was "illegal" and, therefore, evidence of it was inadmissible. Evidence admissibility generally, and in instances such as this in particular, are however more nuanced. Factors that need to be considered and weighed in the balance include whether the evidence was obtained by entrapment or trickery, the nature and significance of the evidence so obtained, the probative value of it as compared to any prejudicial effect it may bring to bear, and the relationships of power and influence that there may be between the parties to the recording. As the cases also show, admitting controversial evidence allows the UNDT to assess the weight to be given to it, a more subtle tool than simple admission

---

<sup>38</sup> See also *Michael David Antoine v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1328, paras. 26-27, in which the UNAT has recently affirmed this principle.

or rejection of it.<sup>39</sup> Assessment of the facts against these tests shows that the UNDT was correct to have admitted the evidence and then applied (significant) weight to it.

92. Without more comprehensive information, we are unaware of what Mr. Loto is alleging when he claims that the Secretary-General is guilty of blatant double standards in objecting to clandestine recordings when these do not favour the Administration's position. Parties are, of course, entitled to make their best cases before the tribunals, but it is ultimately for the tribunals to determine disputed questions on a principled basis and jurisprudence on clandestine recordings should apply equitably. Our response is likewise to Mr. Loto's invocation of the doctrine of excluding "the fruit of the poisoned tree". That is a principle applicable in criminal law in some national jurisdictions and is aimed at keeping investigative bodies "honest" and to discourage them from abusing their powers to unlawfully obtain evidence of criminality. In this case, the covert recording was made by VO1 herself and without direction or input from the United Nations agencies investigating her serious complaints. The fruit of the poisoned tree doctrine is not applicable to this case.

93. Before turning to Mr. Loto's next ground of appeal, it is important to record clearly what this case is, and is not, about. It concerns not whether Mr. J.M. sexually abused or raped VO1. Rather, it is about Mr. Loto's conduct when told by VO1 of her allegations of sexual abuse, including allegedly attempting to steer culpability for his own acts or omissions away from himself and also to allegedly perverting or derailing the course of the investigation into VO1's complaints. Because many of Mr. Loto's points on appeal rely on his contention that there was no determination of the truth of VO1's allegations against Mr. J.M., it is important for this Tribunal to record that this (Mr. J.M.'s culpability) was and is not a relevant consideration.

94. Mr. Loto submits that the UNDT made errors of fact which led to a manifestly unreasonable decision in his case. He says that he could not have been sanctioned for not reporting sexual misconduct when that behaviour had not been established. That argument misconceives the nature of the duty under the relevant United Nations legal framework, which is to report complaints or allegations of sexual misconduct so that those can be investigated.<sup>40</sup> Mr. Loto was told by VO1, someone he knew and who regarded him as a father figure, that she

---

<sup>39</sup> See, most recently, *AAK v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1348, para. 21.

<sup>40</sup> ST/SGB/2003/13, Section 3.2(e) ("Where a United Nations staff member develops concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker (...) he or she must report such concerns via established reporting mechanisms.")

had been raped in circumstances in which Mr. Loto knew, or at least suspected, that she had been in the sole company of the person she named as her rapist. Mr. Loto knew Mr. J.M. had driven VO1 home after an evening of socializing including at Mr. Loto's home. Thus Mr. Loto's subsequent acts and omissions in relation to this matter are inconsistent with a belief that the complaint of rape was false. The UNDT was correct to have concluded that Mr. Loto must have had and did have a sufficient degree of confidence in the veracity of what had been reported to him to have triggered his obligation to report his belief or suspicion to enable the allegation to be investigated. There is nothing in this ground of the appeal.

95. Next, Mr. Loto says the UNDT erred because it heard only from VO1 and not from Mr. J.M. This submission also misses the point. Whether Mr. J.M. had indeed raped VO1 was not in issue in Mr. Loto's case: the crucial point was what VO1 had told Mr. Loto had happened to her. Nothing that Mr. J.M. might have said at the UNDT hearing could have affected that essential question. Even if Mr. Loto could have established that VO1 was not raped by Mr. J.M., his obligation, the breach of which was a part of the misconduct for which was sanctioned, was to report a serious allegation of sexual misconduct of which he had been made aware by VO1 in early to mid-July 2019.

96. Next, Mr. Loto says that the UNDT wrongly relied on a social media (WhatsApp) text exchange between him and VO1 after the night in question. He says that this exchange does not support the conclusion that he was thereby informed of sexual abuse or alternatively, whether he was a witness to an extortion scheme.

97. An analysis of the relevant WhatsApp messages that passed between VO1 and Mr. Loto and the evidence given to the UNDT by VO1 and by Mr. Loto himself, which the Tribunal accepted as true, discloses the following. VO1 told Mr. Loto that she had "a serious issue with [J.M.]" and wanted to complain to the CDT if the "affair" did not end "amicably". However, in the very same WhatsApp message, VO1 went on to tell Mr. Loto explicitly that Mr. J.M. had "sexually abused" her on 8 July 2019, and at a subsequent meeting with her, arranged by Mr. Loto on 10 July 2019, she told him that Mr. J.M. had "raped" her. Mr. Loto confirmed in his testimony that he told VO1 that he wished to have the issue resolved amicably and considered that Mr. J.M. should compensate VO1. He said he would arrange a meeting between VO1 and Mr. J.M. but this did not eventuate.

98. In the context of VO1's friendship with and dependency on Mr. Loto, and given that the events of the evening of 28/29 June were known to him, it is clear that Mr. Loto must have had at least a reasonable suspicion that VO1's allegation against Mr. J.M. of sexual abuse and rape was credible such that he was required to report this to the United Nations authorities. He did not do so, either at the time of the making of these accusations or for several months thereafter.

99. We therefore reject Mr. Loto's ground of appeal that the UNDT erred by finding that there was sufficient genuine information of sexual abuse given to him, such that he was required to report it.

100. Next, Mr. Loto submits that the UNDT erred factually in concluding that VO1 was offered a payment of USD 2,000 when the audio recording of the covertly-recorded conversation of 25 November 2019 clearly shows that in fact she expressed a wish that Mr. J.M. pay her this specific sum and that she thereby attempted to extort it from him.

101. Reviewing all of the circumstances, we first conclude that the exchanges between VO1 and Mr. Loto in July did not involve an attempt by her to extort money from Mr. J.M. Rather, as the UNDT was entitled to accept on the evidence, it was Mr. Loto's suggestion that her complaint be settled amicably, including by Mr. J.M. compensating VO1 adequately. It was in response to that initiative by Mr. Loto that VO1 suggested the payment and its amount. The UNDT was correct to have concluded that in these circumstances, there was no attempted extortion of Mr. J.M. by VO1. There is nothing in this ground of his appeal and we dismiss it.

102. Second, while it is correct that the first mention at the meeting of 25 November 2019 of the sum of USD 2,000 came from VO1, that factor which might seem to favour Mr. Loto must be seen in context. The meeting was arranged by Mr. Loto and Mr. J.O., and the agenda for discussion was set by them and not by VO1. She was asked what it would take to persuade her to withdraw her complaint as it related to Mr. Loto. This was an attempt to engage her in a discussion which they hoped would lead to persuading her that she had made an allegation against Mr. J.M. that would negatively impact Mr. Loto as well. The questions posed invited her, in effect, to "name her price" for doing so. There is no evidence or inference that VO1 went to that meeting herself seeking to extort money or other benefits from anyone, including Mr. Loto, in return for exonerating him from blame that had already potentially attached to him from his failure to promptly report her SEA complaint to the CDT.

103. Before VO1 referred to a sum of money that she wished to receive as compensation for the harm that Mr. J.M. had caused her, Mr. Loto had already exerted moral pressure on VO1 to recant her account about his involvement, emphasizing their close relationship and the significant effect that suspension and eventually perhaps dismissal would have on him and his family. And an element of that ‘compensation’ was Mr. Loto’s unilateral offer of taking VO1 to his home in New York.

104. So while Mr. Loto is correct that the UNDT erred in attributing to him the proposal of the specific amount of money (USD 2,000), that does not alleviate him of liability but only lessens the degree of that responsibility for a series of immoral and unlawful actions towards VO1 undertaken in the company of others also seeking absolution for their roles in VO1’s treatment.

105. Mr. Loto says that the UNDT ignored what he says were suggestive messages sent by VO1 to Mr. J.M. about whom she went to a swimming pool with, very shortly after he allegedly abused her and that these contradicted what she said in evidence at the hearing, thereby calling into question her credibility. We have already recorded that this case is not about the relationship or dealings between VO1 and Mr. J.M. and thus whatever may have passed between them after the night in question is irrelevant to Mr. Loto’s case. The interactions between the Appellant and VO1 are recorded in their WhatsApp exchanges and as found by the UNDT from evidence given to it through in-person testimony which it was entitled to credit as the Judge saw fit. Whether VO1 may have lied to Mr. J.M. about whom she went to the swimming pool with, or been confused about this during the hearing, it was not relevant to the critical issues in this case. None of the foregoing operates to relieve Mr. Loto of his duty as a staff member to report what VO1 told him when it concerned possible SEA.

106. Penultimately, Mr. Loto says that the covertly-recorded conversation exhibits no pressure having been placed on VO1, and finally he highlights the anomaly of the UNDT having found against his credibility in his case, yet considered him a credible witness against Mr. J.O, another staff member against whom similar allegations were made with regard to this same set of events.

107. We disagree with the first proposition that the UNDT erred in concluding that Mr. Loto put pressure on VO1 in their meeting on 25 November 2019. Again, this meeting must be seen in the context of relevant events which had gone before, including the subtle pressures put on

her by him, as a trusted and respected older man, in their WhatsApp exchanges and at their meeting earlier in July. Even overtly, there was evidence that the UNDT was well-entitled to accept that Mr. Loto had sought to persuade VO1 to recant her complaint against him, and this was built upon by him in the November 25 meeting. His duty as a staff member being in receipt of the information he had, was not to encourage VO1 to falsify or withdraw her account to the CDT, nor to seek to persuade her to do so by approving financial and or other inducements (e.g., travel to New York).

108. As to the final submission recorded above in support of his appeal, we consider that the UNDT was entitled to make the findings it did about VO1's credibility where it may have conflicted with Mr. Loto's because, in essence, these matters were determined by reference to the WhatsApp exchanges and the recording of the 25 November 2019 meeting. How the UNDT assessed Mr. Loto's credibility in his testimony against another person in a different case, albeit arising out of the same set of events, does not undermine the UNDT's credibility assessment and findings here.

109. Mr. Loto's grounds of appeal having been based on alleged errors of fact and law made by the UNDT, and having found these to be without merit, it is necessary for us to simply record that we agree with the Dispute Tribunal that, following due processes of investigation and consideration, Mr. Loto's actions and omissions amounted to serious misconduct which justified the sanctions imposed upon him by the USG/MSPG. His appeal must fail, and is accordingly dismissed.



**Judgment**

110. Mr. Loto's appeal against Order No. 081 (NBI/2022) is dismissed for want of jurisdiction, and his appeal in Case No. 2022-1751 is dismissed, and Judgment No. UNDT/2022/081 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 30<sup>th</sup> day of June 2023 in New York, United States.

*(Signed)*

Judge Colgan, Presiding

*(Signed)*

Judge Knierim

*(Signed)*

Judge Gao

Judgment published and entered into the Register on this 26<sup>th</sup> day of July 2023 in New York, United States.

*(Signed)*

Juliet Johnson, Registrar